

1 HONORABLE RICHARD A. JONES
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 LOUIE SANFT, JOHN SANFT, and
17 SEATTLE BARREL AND COOPERAGE
18 COMPANY

Defendants.

Case No. CR 19-00258 RAJ

ORDER ON DEFENDANTS'
JOINT MOTION TO EXCLUDE
CERTAIN OPINIONS OF JOE H.
LOWRY UNDER *DAUBERT* AND
FED. R. EVID. 702

19 I. INTRODUCTION

20 THIS MATTER comes before the Court on Defendants' Joint Motion to Exclude
21 Certain Opinions of Joe H. Lowry Under *Daubert* and Fed. R. Evid. 702. Dkt. 81. The
22 government opposes the motion. Dkt. 95. Having reviewed the pleadings and relevant
23 law, the Court finds that oral argument is unnecessary. For the reasons below, the motion
24 is **DENIED**.

25 II. LEGAL STANDARD

26 Under Federal Rule of Evidence 702, “[a] witness who is qualified as an expert by
27 knowledge, skill, experience, training, or education may testify in the form of an opinion

1 or otherwise if ... the expert's scientific, technical or other specialized knowledge will
2 help the trier of fact to understand the evidence or to determine a fact in issue." A trial
3 court must ensure that an expert's testimony "both rests on a reliable foundation and is
4 relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597
5 (1993). The testimony is reliable "if the knowledge underlying it has a reliable basis in
6 the knowledge and experience of the relevant discipline," and it is relevant "if the
7 knowledge underlying it has a valid connection to the pertinent inquiry." *Primiano v.*
8 *Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (quoting *United States v. Sandoval-Mendoza*,
9 472 F.3d 645, 654 (9th Cir. 2006)). Scientific evidence is reliable "if the principles and
10 methodology used by an expert are grounded in the methods of science."
Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1232 (9th Cir. 2017). "Like the test for
12 admissibility in general, the test of reliability is also flexible." *Pyramid Techs., Inc. v.*
13 *Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2014).

14 A trial court has "broad discretion in assessing the relevance and reliability of
15 expert testimony." *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). "Shaky
16 but admissible evidence" is to be attacked by "[v]igorous cross-examination, presentation
17 of contrary evidence, and careful instruction on the burden of proof," not exclusion. 509
18 U.S. at 596. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a
19 district court to admit opinion evidence that is connected to existing data only by the *ipse
dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). However, an
21 "expert is permitted wide latitude to offer opinions, including those that are not based on
22 firsthand knowledge or observation." 509 U.S. at 592.

23 **III. DISCUSSION**

24 The government disclosed an expert report by Joe H. Lowry, Ph.D. in which he
25 analyzed pH sewer monitoring upstream and downstream of Seattle Barrel and reviewed
26 pH measurements taken by the government. Dkt. 81 at 3. Dr. Lowry's expert report
27 relied, in part, on two EPA reports on the barrel reconditioning industry. Dkt. 82, Ex. B-
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1 C. Defendants take issue with Dr. Lowry's reliance on these reports in concluding that
2 the samples collected by the government from the caustic tank at Seattle Barrel are
3 "consistent with" expected chemical profiles from drum reconditioning facilities. Dkt. 81
4 at 3. Defendants contend that such conclusions are speculative as Dr. Lowry "offers no
5 reason to assume that the wastewater from any individual facility would match a generic
6 industrywide profile." *Id.* at 5. Indeed, they fault Dr. Lowry's report for failing to
7 exclude other sources of high pH liquid, claiming that the wastewater profile for the drum
8 reconditioning industry is "so generic that it could easily apply to wastewater from other
9 types of industrial facilities." *Id.* at 6. Based on these alleged flaws, Defendants argue
10 that Dr. Lowry's opinions on this issue are "unhelpful" to a jury and move to exclude Dr.
11 Lowry from testifying that "any test results or collected samples in his analysis are
12 'consistent with' overgeneralized, unreliable descriptions of generic wastewater profiles
13 or the barrel reconditioning industry at large." *Id.* at 7.

14 The government argues that no part of Dr. Lowry's should be excluded. Dkt. 95 at

15 1. The government contends that Dr. Lowry is "eminently qualified within the field of
16 environmental chemistry" to serve as an expert witness and that his testimony is both
17 relevant and reliable. *Id.* With respect to Defendants' criticism of Dr. Lowry's use of the
18 EPA reports, the government claims that the two reports are "foundational studies []
19 undertaken for the stated purpose of informing the agency on the processes practiced and
20 waste streams produced by industries engaged in the same operations as Seattle Barrel."
21 *Id.* at 9. Moreover, the government notes that "[d]ata collected and analyzed in those
22 studies provided regulators with information to guide rulemaking for the barrel
23 reconditioning industry." *Id.* Dr. Lowry used the metal concentrations identified in the
24 reports to conclude that the samples collected from Seattle Barrel were comparatively
25 similar. *Id.* The government argues that Dr. Lowry's use of the reports is "grounded in
26 established scientific principles." *Id.* The Court agrees.

27 As Defendants do not dispute the relevance of Dr. Lowry's testimony nor his

1 qualifications to offer expert opinion on the matter, the key issue here is the reliability of
2 Dr. Lowry's testimony regarding whether collected samples are "consistent with"
3 expected chemical profiles from drum reconditioning facilities, based in part on the EPA
4 studies. The test for reliability of scientific evidence is whether the principles and
5 methodology applied are "grounded in the methods of science." *GlaxoSmithKline*, 858
6 F.3d at 1232. In determining whether such testimony should be admitted, a court must
7 focus on the principles and methodology applied, not the conclusions drawn. 509 U.S. at
8 595. The test of reliability is flexible." *Pyramid Techs.*, 752 F.3d at 813.

9 The Court concludes that Dr. Lowry's opinions based on the EPA reports at issue
10 are grounded in scientific principles and meet the *Daubert* standard for reliability and
11 Rule 702 requirements. *See Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010)
12 (holding that expert testimony is reliable "if the knowledge underlying it has a reliable
13 basis in the knowledge and experience of the relevant discipline"). The Court finds that
14 testimony based on EPA foundational studies that provide the EPA with information
15 about the processes practiced and waste streams produced by industries engaged in the
16 same operations as Seattle Barrel is indeed both relevant and reliable. Defendants may
17 disagree with Dr. Lowry's opinions and challenge the accuracy of the evidence
18 supporting his conclusions, but their challenge goes to the weight of his testimony, not its
19 admissibility. Indeed, Defendants may attack his testimony through "[v]igorous cross-
20 examination, presentation of contrary evidence, and careful instruction on the burden of
21 proof." 509 U.S. at 596.

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1 For the foregoing reasons, the Court **DENIES** Defendants' Joint Motion to
2 Exclude Certain Opinions of Joe H. Lowry Under *Daubert* and Fed. R. Evid. 702. Dkt.
3 81.

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5 DATED this 13th day of November, 2021.
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9 The Honorable Richard A. Jones
10 United States District Court Judge
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